85-1400

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONTINENTAL BAKING COMPANY,
Petitioner,

vs.

WALTER MACON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. IN AN ACTION FILED UNDER §301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. §185(a), MUST THE PLAINTIFF BOTH FILE AND SERVE THE COMPLAINT WITHIN THE SIX MONTH LIMITATION PERIOD PROVIDED UNDER §10(b) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §160(b).

II. DID THE SIXTH CIRCUIT ERR IN RULING THAT PLAINTIFF'S COMPLAINT FOR BREACH OF THE COLLECTIVE BARGAINING AGREEMENT AGAINST THE PETITIONER AND VIOLATION OF THE DUTY OF FAIR REPRESENTATION AGAINST THE UNION WAS NOT BARRED BY THE SIXTH MONTH STATUTE OF LIMITATIONS SET FORTH IN 29 U.S.C. §160(b) EVEN THOUGH THE COMPLAINT WAS NOT SERVED WITHIN THE SIX-MONTH LIMITATION PERIOD.

PARTIES TO THE PROCEEDINGS

Petitioner, Continental Baking Company, formerly ITT Continental Baking Company, Inc., and Bakery Drivers' Union Local 52, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America were Defendants-Appellees below. Respondent Walter Macon was the Plaintiff-Appellant below.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceedings	ii
Table of Authorities	iv
Petition	1
Opinions Below	2
Jurisdiction	2
Statutes and Rules Involved	2
Statement of the Case	3
I. Relevant Facts	3
II. Proceedings Below	4
Reasons For Granting The Writ	6
I. The Decision By The Sixth Circuit That A Complaint In A Breach Of Contract/Breach Of Duty Of Fair Representation Action Need Not Be Served Within The Six Month Limitation Period Set Forth In 29 U.S.C. §160(b) Is In Direct Conflict With The Decisions Of The Third, Ninth and Eleventh Circuits And Presents An Important And Recurring Question Of Federal Law With Respect to Which The Supreme Court's Guidance Is Needed	6

II. The Sixth Circuit Erred In Failing To Apply The Plain Language Of 29 U.S.C. § 160(b) And, Accordingly, Its Decision Erroneously Applies The Supreme Court's Holding In *Del Costello v. International Brotherhood Of Teamsters,* 462 U.S. 151 (1983) 7

Conclusion 11

Appendix:

A. Sixth Circuit Opinion, dated December 23, 1985 ..... A-1

B. Sixth Circuit Judgment, dated December 23, 1985 ..... A-13

C. District Court Memorandum and Order granting Defendants' Motions to Dismiss and for Summary Judgment, dated February 17, 1983 A-15

D. District Court Order dismissing Plaintiff's Complaint, dated February 18, 1983 ..... A-18

TABLE OF AUTHORITIES

Page

Cases:

Baine v. C-Poultry Co., Ltd., No. 85-7440 (11th Cir. Jan. 23, 1985) 6

Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 5,7,8,9,10

Dunlap v. Lockheed-Georgia Co., 755 F.2d 1543 (11th Cir. 1985) 6

Ellenbogen v. Rider Maintenance Corp., No. 84 Civ. 3513 (S.D.N.Y. Oct. 28, 1985) 6

Gallon v. Levin Metals Corp., Nos. 85-1769, 85-1814 (9th Cir. Jan. 7, 1986) 6

Hoffman v. United Markets, Inc., 117 LRRM 3229 (N.D. Cal. 1984) 6

Howard v. Lockheed-Georgia Co., 742 F.2d 612 (11th Cir. 1984) 6,10

International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 10

LaTondress v. Local 7, IBT, 102 F.R.D. 295 (W.D. Mich. 1984) 7

NLRB v. Local 264, Laborer's International Union, 529 F.2d 778 (8th Cir. 1976) 7

Simon v. Kroger Co., 743 F.2d 1544 (11th Cir.) *cert. denied,* 105 S.Ct. 2155 (1985) 6,7,10

Thompson v. Ralston Purina Co., 599 F. Supp. 756 (W.D. Mich. 1984) 6

Thomsen v. United Parcel Service, Inc., 608 F.Supp. 1244 (S.D. Iowa 1985)..... 7

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 8

Waldron v. Motor Coils Manufacturing Co., 606 F. Supp. 658 (W.D. Pa. 1985) 6

West v. Conrail, No. 85-5219 (3d Cir. Dec. 31, 1985) ... 6,8

Williams v. E. I. duPont de Nemours Co., 581 F. Supp. 791 (M.D. Tenn. 1983) 7

Williams v. Greyhound Lines, Inc., 756 F.2d 818 (11th Cir. 1985) 6

Statutes and Rules

28 U.S.C. §1254(1) 2

28 U.S.C. §2101(c) 2

29 U.S.C. §160(b), National Labor Relations Act §10(b) ..... *passim*

29 U.S.C. §185(a), Labor Management Relations Act §301 3,4,6,7,11

Ohio Rev. Code §2711.13 4

Rule 3, Federal Rules of Civil Procedure 3,10

Rule 4(j), Federal Rules of Civil Procedure 3,9

Rule 20, Supreme Court Rules 2

Other Authorities:

Wright and Miller, *Federal Practice and Procedure*, §1056 10

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONTINENTAL BAKING COMPANY,
Petitioner,

vs.

WALTER MACON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, CONTINENTAL BAKING COMPANY,[1] formerly ITT Continental Baking Co., Inc. (hereinafter referred to as "Continental"), respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 23, 1985.

---

[1] Petitioner is a wholly-owned subsidiary of Ralston Purina Internationa, Inc., which is a wholly-owned subsidiary of Ralston Purina Company. Petitioner has two subsidiaries which are not wholly-owned: Continental de Alimentos, S.A. de C.V. and Wonder del Centro, S.A. de C.V.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit rendered in this case is reported at 779 F.2d 1166 (6th Cir. 1985) and appears as Appendix A hereto. The opinion and judgment of the Sixth Circuit reversed the judgment of the United States District Court for the Northern District of Ohio. The Opinion and Order of the District Court appears as Appendix C hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was entered in this case on December 23, 1985. This Petition for Writ of Certiorari was filed within sixty days of December 23, 1985 as is required by 28 U.S.C. §2101(c), and Rule 20 of the Supreme Court Rules. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

I. National Labor Relations Act §10(b), 29 U.S.C. §160(b):

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a Complaint stating the charges in that respect, and containing a Notice of Hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not five days after the serving of said Complaint: Provided, that no Complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom the charge is made...

II. Labor Management Relations Act, §301, 29 U.S.C. §185(a).

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

III. Rule 3 Of The Federal Rules Of Civil Procedure.

> A civil action is commenced by filing a complaint with the Court.

IV. Rule 4(j) Of The Federal Rules Of Civil Procedure.

> (j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

STATEMENT OF THE CASE

I. Summary of Facts.

The essential facts with respect to the issue before this Court were never in dispute. Respondent Macon was employed as a route sales representative by Continental from June 16, 1973, until his termination on November 18, 1981. In this petition, Macon was covered by a collective bargaining agreement between Continental and the Bakery Drivers' Union Local 52, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union").

On October 26, 1981 in a meeting with Continental management and William Evans, a representative of the Union, Macon was informed that a Continental customer had accused Macon of overcharging him for deliveries. Macon was further told that such overcharges, if substantiated, would subject him to discipline, up to and including discharge. At that time, Macon was suspended pending a further investigation.

In a second meeting on November 18, 1981, between Continental management, Macon, his attorney, Evans and two Union stewards, Macon was informed that Continental's investigation had revealed that there was substance to the overcharging complaint and, in addition, the investigation had uncovered a second complaint of irregular charges. Macon was told that he was being discharged for dishonesty.

II. The Proceedings Below.

On May 18, 1982, exactly six months after his termination, Macon filed a complaint in the United States District Court for the Northern District of Ohio against Continental and the Union under §301 of the Labor Management Relations Act (LMRA), 29 U.S.C. §185(a). The complaint alleges: a) his termination violated the collective bargaining agreement between Continental and the Union; (b) the Union breached its duty of fair representation (a "hybrid" §301 action). However, service of the complaint upon Continental and the Union was not made until after the expiration of the six month period provided for in §10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. §160(b).

Thereafter, Continental and the Union filed motions to dismiss or, in the alternative, for summary judgment. On February 17, 1983, the District Court granted the Motion to Dismiss, ruling that Macon's claim was barred by the ninety-day statute of limitations for vacation of arbitration awards under Ohio law. Ohio Rev. Code §2711.13. The District Court further granted the Motions for Summary Judgment on the ground that no genuine issues of material fact remained.

Macon appealed the judgment of the District Court dismissing his complaint. On appeal, Macon contended that under *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983), the six month statute of limitations provided in §10(b) of the NLRA should be applied and that his complaint was, therefore, timely. Continental and the Union argued that *Del Costello* should not be given retroactive application and that, even if the six month limitation period was used, Macon's suit was not timely because neither Continental nor the Union were served within the six month period as required by §10(b).

On December 21, 1985, the Sixth Circuit reversed the District Court. In so doing, the Court held that *Del Costello* should be given retroactive effect and that, since Macon's suit had been *filed* within the six-month limitation period, it was timely despite his failure to serve Continental and the Union within that period. In so doing, the Court concluded that nothing in the Supreme Court's *Del Costello* opinion indicated that service within six months was "an additional requirement for a timely suit." *Macon v. ITT Continental Baking Co., Inc.,* 779 F.2d 1166, 1170 (6th Cir. 1985). (See Appendix A).

REASONS FOR GRANTING THE WRIT

I. The Decision By The Sixth Circuit That A Complaint In A Breach Of Contract/Breach Of Duty Of Fair Representation Action Need Not Be Served Within The Six-Month Limitation Period Set Forth In 29 U.S.C. §160(b) Is In Direct Conflict With The Decisions Of The Third, Ninth And Eleventh Circuits And Presents An Important Question Of Federal Law With Respect To Which The Supreme Court's Guidance Is Needed.

The Sixth Circuit is the only Circuit Court of Appeals to rule that a hybrid §301 action need not be served within the six month limitation period provided in 29 U.S.C. §160(b). To date, the Third, Ninth and Eleventh Circuits have been consistent in holding that a hybrid §301 suit, is timely only when the Plaintiff both files *and* serves the complaint within the six-month limitation period of §10(b) of the NLRA. *West v. Conrail,* No. 85-5129 (3d Cir. Dec. 31, 1985); *Gallon v. Levin Metals Corp.,* Nos. 85-1769, 85-1814 (9th Cir. Jan. 7, 1986); *Howard v. Lockheed-Georgia Co.,* 742 F.2d 612 (11th Cir. 1984); *Simon v. Kroger Co.,* 743 F.2d 1544 (11th Cir. 1984), *cert. denied* 105 S.Ct. 2155 (1985); *Williams v. Greyhound Lines, Inc.,* 756 F.2d 818 (11th Cir. 1985); *Dunlap v. Lockheed-Georgia Co.,* 755 F.2d 1543 (11th Cir. 1985); *Baine v. C-Poultry Co., Ltd.,* No. 85-7440 (11th Cir. Jan. 23, 1986).

In addition to the weight of authority from these three Circuit Courts of Appeal, at least four district courts have similarly held that the requirement under §10(b) of the NLRA of both filing and service within six months should be applied to hybrid §301 suits. *Ellenbogen v. Rider Maintenance Corp.,* No. 84 Civ. 3513 (S.D. N.Y. Oct. 28, 1985); *Waldron v. Motor Coils Manufacturing Co.,* 606 F.Supp. 658 (W.D. Pa. 1985); *Thompson v. Ralston Purina Co.,* 599 F.Supp. 756 (W.D. Mich. 1984); *Hoffman v. United Markets, Inc.,* 117 LRRM 3229 (N.D. Cal. 1984). However, several other district courts have expressed the

view adopted by the Sixth Circuit. *Thomsen v. United Parcel Service, Inc.*, 608 F.Supp. 1244 (S.D. Iowa 1985); *LaTondress v. Local No. 7, IBT,* 102 F.R.D. 295 (W.D. Mich. 1984); *Williams v. E.I. duPont de Nemours Co.,* 581 F.Supp. 791 (M.D. Tenn. 1983).

The above cases reflect the important and recurring nature of this issue. In addition, these decisions raise an important question of federal law with respect to the application of this Court's decision in *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983), a question which should be "quickly and dispositively" resolved by this Court. *Simon v. Kroger Co.*, ____ U.S. ____, 105 S.Ct. 2155, 2157 (White, J. dissenting).

II. The Sixth Circuit Erred In Failing To Apply The Plain Language Of 29 U.S.C. §160(b) And, Accordingly, Its Decision Erroneously Applies This Court's Holding In *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983).

The plain language of §10(b) requires filing *and* service within the six month period. See e.g., *NLRB v. Local 264, Laborer's International Union,* 529 F.2d 778, 782 (8th Cir. 1976); *Simon v. Kroger Co.*, ____ U.S. ____, 105 S.Ct. 2155, 2156 (White, J. dissenting). The only issue is whether the requirements of §10(b) in its entirety should be applied to hybrid §301 actions.

In selecting §10(b) to be applicable to all hybrid §301 actions, this Court noted that this statute was "actually designed to accommodate a balance of interests very similar to that at stake" in hybrid §301 actions. *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. at 169. This Court found that in enacting §10(b)

> Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of

> private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. This is precisely the balance at issue in this case... "[T]he need for uniformity" among procedures followed for similar claims...as well as the clear Congressional indication of the proper balance between the interests at stake, counsels for adoption of §10(b) of the NLRA as the appropriate limitations period for lawsuits such as this. [*United Parcel Service v. Mitchell*], 451 U.S. at 70-71 (Stewart, J. concurring).

Id. at 171.

Although this Court was concerned in *Del Costello* with the inadequacies of the admittedly short state statutes of limitations applicable to actions to vacate arbitration awards, the Court has likewise recognized the "undesirability of the results of a grievance and arbitral process being suspended in limbo for long periods." *United Parcel Service v. Mitchell,* 451 U.S. 56, 64 (1981). As the Court noted in *Mitchell,*

> the system, with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later.

Id. at 64.

It was with these considerations in mind that this Court adopted the six month limitation period of §10(b). To excise the service requirement of §10(b) as suggested by the Sixth Circuit would be to effectively defeat the purpose for applying the relatively short §10(b) period. That purpose is to facilitate a speedy resolution of claims in connection with the collective bargaining process without denying recourse of employees to challenge the process. As the Third Circuit panel majority noted in *West v. Conrail, supra:*

> The balance struck by Congress and recognized in *Del Costello* is reflected in the language of 10(b), which unambiguously requires both filing and service of process within six months of the accrual of the cause of action. *We are reluctant to upset that balance by grafting Fed. Rule Civ. Proc. 4(j) onto 10(b), particularly since doing so would increase the time limit for initiation of the dispute resolution process from six to ten months, a substantial addition.*
>
> While it is true as [dissenting] Judge Gibbons notes, that the complaint in an unfair labor practice proceeding is filed by the General Counsel after an investigation of the employee's charge, it is the filing and service of the charge that notifies the employer of the charge and initiates the dispute resolution process in such a proceeding. The filing and service of the complaint performs the same function in a hybrid labor suit like the one before us. Section 10(b) promotes the prompt resolution of labor disputes by requiring an early initiation of the dispute resolution process and *Del Costello* teaches that this policy should be implemented in hybrid labor suits as well. That policy is best served by borrowing the service requirement, as well as the filing requirement, of §10(b).

Sl. Op. at 6 (Emphasis added).

Such a result is not only consistent with Congress' intent with respect to speedy and final resolution of labor disputes but also works no injustice upon the individual employee who desires to challenge the conduct of the parties to the labor contract. The six month limitation period is significantly longer than the state statutes applied prior to *Del Costello* and presents reasonable opportunity even for those "unsophisticated in collective-bargaining matters" to bring their claim. *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. at 166. Although not a controlling point, in this case Macon was represented by his attorney at the very point of his termination, *the full six*

months before this suit was filed. Thus, he like any other employee in a similar situation, had ample opportunity to file *and* serve a complaint within the six month §10(b) period.

While civil actions are generally commenced by the filing of a complaint under Rule 3 of the Federal Rules of Civil Procedure, in some cases federal statutes impose additional requirements, beyond the mere filing of a complaint, to commence an action. In these federal question jurisdiction cases, where the statutory provisions dictate what steps must be taken to toll the statute of limitations, such statutory provisions are controlling and "the application of Rule 3 is not involved." Wright and Miller, *Federal Practice and Procedure,* §1056.

Disputes such as this, in which the plaintiff alleges his dismissal violates the collective bargaining agreement and complains of the sufficiency of his union representation, are unarguably labor disputes. And, where the substance of the conflict consists of a labor dispute, the 10(b) limitation period should be applied in its entirety to carry out the federal policy of facilitating relatively rapid disposition of labor disputes. *International Union, UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696, 707 (1966). Ignoring the filing requirements of 10(b) defeats the very purpose for which this section was adopted by this Court in *Del Costello.* Indeed, excising the service requirement delays the resolution of the dispute, a result this court has consistently sought to avoid.

In light of the need for rapid and final resolution of labor disputes and the fact that Congress itself has provided a statutory limitation period for closely analagous claims, "there is no reason why the six-month period would be borrowed and the filing and service would be left to the general rule." *Howard v. Lockheed-Georgia Co.,* 742 F.2d 612, 614 (11th Cir. 1984). The Eleventh Circuit, in *Simon v. Kroger Co., supra,* summarizing why §10(b) should be read and applied in its entirety, concluded:

> We find that the intent, spirit, and plain language of §10(b) require that a complaint [in a hybrid §301/fair representation case] be both filed and served within the six-month limitation period.

743 F.2d at 1546.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the opinion and judgment of the Sixth Circuit Court of Appeals in this case.

Respectfully submitted,

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Dated:

APPENDIX

ATTENTA

No. 83-3197

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Walter Macon,
Plaintiff-Appellant,

v.

ITT Continental Baking Co.,
Inc., et al.,
Defendants-Appellees.

On Appeal from the United States District
Court for the Northern District of Ohio.

Decided and Filed December 23, 1985

Before: ENGEL and KEITH, Circuit Judges; COHN, District Judge.*

ENGEL, Circuit Judge. Intervening decisions of the Supreme Court and in our circuit have reduced the issues in this appeal to one: does the six-month limitation upon hybrid 301/fair representation suits borrowed from section 10(b) of the National Labor Relations Act borrow as well the requirements that both filing *and service* of the complaint be accomplished within the six-month period? We answer in the negative and hold that such actions are instead governed by the filing and service requirements under the Federal Rules of Civil Procedure generally applicable to civil suits in the district court. Accordingly we reverse and remand.

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* Honorable Avern Cohn, Judge for the United States District Court for the Eastern District of Michigan, sitting by designation.

Walter Macon was employed as a route sales representative by appellee ITT Continental Baking Company, Inc. (ITT) from June 16, 1973, until he was discharged on November 18, 1981. As a route sales representative, Macon was within the bargaining unit covered by the collective bargaining agreement between ITT and appellee Bakery Drivers' Union Local 52, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Local 52 or Union).

On October 26, 1981, members of ITT management met with Macon and William Evans, Local 52's secretary/treasurer, and informed them that an ITT customer had alleged that Macon had been overcharging him for deliveries. Macon was also told that such overcharging, if verified, would constitute "dishonesty" under the collective bargaining agreement and would, therefore, subject him to possible sanctions, including discharge without a prior hearing. Macon was suspended pending further investigation.

On November 18, 1981, a second meeting was held, attended by ITT management, Macon, Evans, two Union stewards, and Macon's attorney. ITT representatives informed Macon that their investigation had confirmed the overcharging complaint and had uncovered a second complaint of irregular charging. Macon was then told that he was being terminated for dishonesty.

On May 18, 1982, exactly six months after his discharge, Macon filed a complaint in the United States District Court for the Northern District of Ohio against ITT and Local 52 under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, claiming that his discharge violated the ITT-Local 52 collective bargaining agreement and that Local 52 had breached its duty of fair representation. Service of the complaint upon the Company and Local 52 was made after the expiration of the six-month period but well within the 120 days prescribed by Rule 4(j) of the Federal Rules of Civil Procedure.

Appellees filed motions to dismiss or, in the alternative, for summary judgment. The district court granted the motions to dismiss, concluding that Macon's claim was barred by Ohio's ninety-day statute of limitations for vacation of arbitration awards, Ohio Rev. Code § 2711.13. The court also granted the defendants' summary judgment motions on the ground that no genuine issue of material fact remained.

On appeal, Macon contends that under *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the six-month statute of limitations of section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b), applies and that his claim was, therefore, timely filed. ITT and Local 52 argue that *DelCostello* should not be retroactively applied here. They further state that even if the statute of limitations contained in section 10(b) is used here, Macon's suit was not timely because the defendants were not *served* within the six-month period as section 10(b) requires. *See Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984).[1]

I.

The trial judge's decision came prior to the Supreme Court's decision in *DelCostello v. International Brotherhood of Teamsters*, which holds that the six-month limitations period of section 10(b) of the NLRA, 29 U.S.C. § 160(b), is applicable to hybrid section 301/fair representation suits. Hybrid suits, such as those in *DelCostello* and here, involve allegations of a breach

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[1] ITT and Local 52 also contend that even if Macon's suit was timely filed, the district court should be affirmed on the alternate ground that Macon failed to exhaust his contractual remedies under the collective bargaining agreement before bringing suit. Macon counters that his failure to make a written request that the Union pursue his grievance may be excused because such a request would have been futile. Because we find that the district court did not adequately address this issue, we decline to address it on this appeal. The issue therefore remains to-be-decided by the district court on remand.

of the collective bargaining agreement by the employer and a breach of the duty of fair representation by the union, both in violation of section 301 of the LMRA, 29 U.S.C. § 185.

In *DelCostello,* the Supreme Court concluded that in hybrid actions application of the most nearly analogous state limitation statues "suffer[s] from flaws, not only of legal substance, but more important, of practical application in view of the policies of federal labor law and the practicalities of hybrid § 301 /fair representation litigation." 426 U.S. at 165. The Court, therefore, decided to borrow instead the federal statute of limitations contained in section 10(b) of the NLRA, 29 U.S.C. § 160(b). *Id.* at 169.

Section 10(b) establishes a six-month period for filing unfair labor practice charges with the National Labor Relations Board (NLRB). It provides in pertinent part:

> (b) Whenever it is charged that any person had engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made,* unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

29 U.S.C. § 160(b) (emphasis added).

Under the Supreme Court's holding in *DelCostello,* the six-month period of section 10(b) is applicable to the instant case. While appellees have argued that *DelCostello* should not be applied retroactively here, in *Smith v. General Motors Corp.,* 747 F.2d 372 (6th Cir. 1984), the Sixth Circuit sitting *en banc* held that *DelCostello* would be retroactively applied to cases such as this.

The only limitations question therefore remaining for us is whether Macon's suit was timely under *DelCostello* and section 10(b). It is undisputed that, although Macon's complaint was filed within the six-month period, service of process was effected only after the six-month period had expired.

Our circuit in *Mohler v. Miller,* 235 F.2d 153, 154-55 (6th Cir. 1956), recognized the general rule applicable to civil actions.

> Under Rules 3 and 4, Federal Rules of Civil Procedure, 28 U.S.C.A., an action is commenced by the filing of a complaint, the issuance forthwith by the clerk of a summons and its delivery to the marshal for service. It is the filing of the complaint, when followed by the lodging of the writ with the marshal, that tolls the statute of limitations.

See also United States v. Wahl, 583 F.2d 285, 288 (6th Cir. 1978). Thus, under this general rule, Macon's suit was timely insofar as it was filed within the limitations period even though service of process was not had within that period.

The company and the union contend, however, that under the statutory language of section 10(b) Macon's complaint had to be filed and served within the six-month period if the running of the statute of limitations was to be tolled effectively. Their position is supported by several decisions, primarily from the Eleventh Circuit.

In *Howard v. Lockheed-Georgia Co.,* 742 F.2d 612 (11th Cir. 1984), the Eleventh Circuit held that a mixed 301 suit is timely

only when the plaintiff files *and serves* his complaint within the six-month period of section 10(b):

> As a general rule, an action is "commenced" in federal court by the filing of a complaint. *See Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1188 (5th Cir. 1980). The general rule expressed governs when the statute of limitations merely requires that an action be "brought," "commenced," or "initiated" within a specified time. Here, however, Section 10(b) expressly requires both filing *and* service within a six months period.
>
> > [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .
>
> 29 U.S.C.A. 160(b).

The plaintiff argues that § 10(b)'s service requirement is an administrative rule promulgated by the National Labor Relations Board for administrative procedures and should not apply in judicial proceedings. The limitations period was "borrowed" from the provision that applies to proceedings before the National Labor Relations Board, however, *see DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 1, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The service of process requirement is part of the express statutory provision. There is no reason why the six-month period would be borrowed and the filing and service would be left to the general rule. *N.L.R.B. v. Local 264, Laborer's International Union,* 29 F.2d 778, 782 (8th Cir. 1976) ("The statute is clear in providing that a charge must not only be filed, it must also be served within the prescribed six-month period."); *see* H.R.Rep. No. 510, 80th Cong., 1st Sess., 53 (1947), *reprinted in* U.S. Code Cong. Serv. 1135, 1159 (1947) (Conference Committee Statement by House Managers).

> [2] Since the complaint was not served within the time the six-month period had concededly expired, the district court properly entered summary judgment for defendants.

742 F.2d at 613-14. The Eleventh Circuit reached the same result once more in *Simon v. Kroger,* 743 F.2d 1544, 1546 (11th Circ. 1984), *cert. denied,* 105 S.Ct. 2155 (1985):

> We find that the intent, spirit, and plain language of section 10(b) require that a complaint [in a hybrid section 301/fair rpresentation case] be both filed and served within the six-month limitations period.

At least three other courts have also held that the requirement under section 10(b) of both filing and service within six months applies to hybrid section 301/fair representation suits. *See Waldron v. Motor Coils Manufacturing Co.,* 606 F.Supp. 658, 659 (W.D. Penn. 1985) (relying on *Howard* and *Simon); Thompson v. Ralston Purina Co.,* 599 F.Supp. 756, 758 (W.D. Mich. 1984) (relying on *Howard); Hoffman v. United Markets, Inc.,* 117 L.R.R.M. 3229, 3230 (N.D. Cal. 1984) (relying on the language of section 10(b)). None of these decisions analyze this question at any length.

Several courts, however, have not followed the Eleventh Circuit rule. In *Smith v. General Motors Corp., supra,* our court held that one plaintiff's suit was timely under *DelCostello* when it was filed five months and twenty-seven days after his discharge. We did not there expressly discuss when service was had or the possible application of the Eleventh Circuit's rule. Other courts, however, have expressly considered and rejected the rationale expressed in *Howard. See Thomsen v. United parcel Service, Inc.,* 608 F.Supp. 1244 (S.D. Iowa 1985); *LaTondress v. Local No. 7, IBT,* 102 F.R.D. 295 (W.D. Mich. 1984); *Williams v. E.I. duPont de Nemours Co.,* 581 F.Supp. 791, 792-93 (M.D. Tenn. 1983). In our view objections raised by those courts are well-founded.

There is nothing in the *DelCostello* opinion to indicate that service within six months is an additional requirement jor a timely suit.[2] As Judge Benjamin Gibson in *LaTondress, supra,* pointed out, "in applying the [section 10(b)] period to the two complaints before the Court in *DelCostello,* the focus was on the time of filing." 102 F.R.D. at 296.

Without intending any disrespect it seems to us that *DelCostello* was perceived by the Supreme Court as presenting a practical problem which existed nationwide and needed a practical nationwide solution.[3] Although this approach may be criticized, the result in *DelCostello* can only be considered felicitous by the bench and bar generally. Certainty was achieved at the dubious expense of the somewhat ephemeral concepts which have governed the resolution of the "most nearly analogous" state law limiting the time for starting lawsuits. In our view, the Supreme Court in *DelCostello* was seeking a uniform rule to be applicable to actions which were historically federal in their nature, actions created by Congress but with no thought to the length of time within which they should be

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[2] On the contrary, the Supreme Court expressly noted that it was applying the statute of limitations of section 10(b) to hybrid section 301/fair representation suits, "not because the legislature enacting that limitations provision intended that it apply elsewhere, but because it is the most suitable source for borrowing to fill a gap in federal law." *DelCostello,* 462 U.S. at 170 n.21. There is, however, no "gap in federal law" insofar as the commencement of a civil action in a federal court is concerned. Fed. R. Civ. P. 3 unequivocally states that, "A civil action is commenced by filing a complaint with the court."

[3] The dissents in *DelCostello* reinforce this conclusion and employ it as a basis for criticism that the Supreme Court was therefore unfaithful to its earlier rule. 462 U.S. at 172-73, 174-75 (Stevens, J., dissenting) (O'Connor, J., dissenting separately). Perhaps so, but that rule itself was judge-made. *Auto Workers v. Hoosier Cardinal Corp.,* 383 U.S. 696, 703-05 (1965).

brought. For a solution, the Supreme Court looked to the substance of the conflict and not to the forum in which it necessarily arose. While the "most nearly analogous rule" might ordinarily suggest repair to state law there certainly is no evil in consulting as well the judgment of Congress in those rare instances where it has seen fit to express it. That, in our view, is just what the Supreme Court did and what its action may lack in juristic purity is more than offset by common sense.

One of the Supreme Court's principal objections voiced in *DelCostello* was the abbreviated period which had usually been allowed by applying state statutes of limitation governing vacation of arbitration awards. The Supreme Court first noted in *DelCostello* that "state arbitration statutes typically provide very short times in which to sue for vacation of arbitration awards." 462 U.S. at 166 & n.15. The Court then stated that the short periods are adequate in cases of commercial arbitration where plaintiffs are usually represented by counsel or are at least experienced in commercial dealings. It also noted that in commercial arbitration cases, all issues have normally been raised in the arbitration itself. In contrast, in section 301 cases employees are often unsophisticated and unrepresented by counsel, and issues concerning the quality of the union's representation were very probably not raised or litigated in the grievance procedure. The Supreme Court concluded that because of these differences, the state limitations periods for vacation of arbitration awards "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." *Id.* at 166 (footnote omitted). The Supreme Court was clearly concerned about the adequacy of the length of the limitations period established for hybrid suits.

Applying the *Howard* rule to hybrid suits would substantially limit the amount of time available to a hybrid plaintiff before bringing suit. Suit would have to be filed substantially before the six-month period expired to insure service within the period.

Thomsen, 608 F.Supp. at 1246. Moreover, the *Howard* rule would deny section 301 plaintiffs the benefit of the 120 days grace period Fed. R. Civ. P. 4(j) allows other federal court plaintiffs between filing and serving the complaint. *LaTondress,* 102 F.R.D. at 297. As we have observed earlier, entirely apart from the time factor in itself, we believe a policy of uniformity in the application of the Federal Rules of Civil Procedure clearly favors the application of Rule 4 here as in other civil cases brought in the district court.

Courts critical of the *Howard* rule have also noted that the tolling provision of section 10(b) was designed for administrative proceedings and is inappropriate in the federal judicial context. *See Thomsen,* 608 F.Supp. at 1245. Indeed, it has long been recognized that Congress created the administrative courts system with quite different concerns from those which necessarily governed Article III courts. *See Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 142-44 (1940); *see also N.L.R.B. v. Donnelly Garment Co.,* 330 U.S. 219, 227 (1947). The service requirement of section 10(b) is necessary in NLRB proceedings because without it there would be no rule at all. In the federal courts, however, Fed. R. Civ. P. 4(a) orders the clerk of court to "forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint," and Fed. R. Civ. P. 4(j) requires such service to be made within 120 days. Thus, the service requirement of section 10(b) would fulfill no purpose in the federal courts but to confuse.

Finally, in a similar situation involving section 1983 suits, courts have uniformly rejected the principle that a statute of limitations tolling provision automatically follows a statute of limitations borrowed for a federal cause of action. *See Thomsen,* 608 F.Supp. at 1245-46. Because "the Reconstruction Civil Rights Acts do not contain the specific statute of limitations governing § 1983 actions," the courts must borrow

an analogous state statute of limitations for section 1983 suits. *Wilson v. Garcia,* 105 S.Ct. 1938, 1942 (1985).[4] Some states' rules, unlike the federal rules, provide that service of process rather than the filing of the complaint tolls the statute of limitations, but when federal courts have borrowed state statutes of limitations in section 1983 actions, they have *not* also "borrowed" those states' rules concerning when a suit is commenced for statute of limitations purposes:

> While state law controls the time within which an action must be begun, the manner in which an action is commenced and when it is deemed to have begun, are governed by the law of the forum. These matters are procedural and not substantive.

Mohler v. Miller, 235 F.2d 153, 155 (6th Cir. 1956). Therefore, even if a state statute of limitations is borrowed and that state's rules also provide that service, not filing, tolls the statute of limitations, "[t]he prevailing rule among the federal courts of appeals is that Rule 3 [of the Federal Rules of Civil Procedure] governs the time of commencement of the action in cases where a federal matter or cause of action is involved." *Wells v. City of Portland,* 102 F.R.D. 796, 800 (D. Or. 1984); *see also Jackson v. Duke,* 259 F.2d 3, 6 (5th Cir. 1958); *Bomar v. Keyes,* 162 F.2d 136, 140 (2d Cir.), *cert. denied,* 332 U.S. 825 (1947); *Cohn v. Board of Ed. of East Ramapo Cent. School,* 536 F.Supp. 486, 493-95 (S.D.N.Y. 1982); *Gutierrez v. Verigari,* 499 F.Supp. 1040, 1049 n.7 (S.D.N.Y. 1980); *Davis v. Krauss,* 478 F.Supp. 823, 825 (E.D.N.Y. 1979); *Triplett v. Azordegan,* 478 F.Supp. 872, 878 (N.D. Iowa 1977), *aff'd,* 570 F.2d 819 (8th Cir. 1978).

Like a section 1983 claim, a hybrid section 301/fair representation claim remains a federal cause of action for which a limita-

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[4] In *Wilson v. Garcia,* the Supreme Court recently held that each state's limitations period for suits alleging personal injury should be applied in all section 1983 actions.

tions period is borrowed. These cases concerning section 1983 demonstrate that a statute of limitations is borrowed for a federal cause of action without also borrowing the rules concerning when the statute begins to run.[5]

In conclusion, we decline to follow the position taken by the Eleventh Circuit in *Howard* and hold instead that the complaint was timely filed here and that service of it, within the time prescribed by Fed. R. Civ. P. 4(j), would also be timely. Accordingly, this case is REVERSED and REMANDED for further proceedings consistent with this opinion.

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[5] In diversity cases, it is true, federal courts must follow state law in determining when an action is commenced for the purpose of tolling the state statute of limitations. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Ragan v. Merchants Transfer Co.*, 337 U.S. 530 (1949). However, the Supreme Court has stated that these diversity decisions may be distinguished from cases involving a federal cause of action. In *Walker,* the Court expressly noted that their opinion did not "address the role of [Fed. R. Civ. P.] 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed by state law, if the cause of action is based on federal law." *Walker,* 446 U.S. at 751 n.11. Policies favoring close adherence to state law in diversity cases, of course, are largely absent when the legal action itself is essentially based upon federal substantive law.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3197

Walter Macon,
Plaintiff-Appellant,

v.

ITT Continental Baking Company, Inc., et al.,
Defendants-Appellees.

Before: ENGEL and KEITH, Circuit Judges; and COHN, District Judge.

JUDGMENT

(Filed Dec. 23, 1985)

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on be be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded for further proceedings consistent with this opinion.

It is further ordered that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

A true Copy.

Attest:

/s/
Deputy Clerk

Issued as Mandate: January 14, 1986

COSTS: None

Filing fee.....$
Printing.....$

Total.....$

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

C82-1330

Walter Macon
Plaintiff

v.

ITT Continental Baking
Company, Inc., et al.
Defendants

MEMORANDUM AND ORDER

The plaintiff brought this action pursuant to §301 of the Labor Management Relations Act, 29 U.S.C. §185 against his former employer, ITT Continental Baking Company, Inc., (The Company) for the alleged breach of a collective bargaining agreement, and against his former union, Bakery Drivers' Union Local 52, (The Union) for the alleged breach of the Union's duty of fair representation.

Both the Union and the Company have moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) or in the alternative for summary judgment.

The plaintiff was employed by the Company as a salesman from approximately 1973 until November 18, 1981, when he was fired for dishonesty. Although the plaintiff never filed a written grievance with the Union or with the Company, he has submitted an affidavit in which he asserts that he asked William Evans, the Secretary-Treasurer of his union local, to file a grievance on his behalf, and Evans declined. The plaintiff filed the instant action May 18, 1982.

To prevail against either the Company or the Union, the plaintiff must show a breach of the collective bargaining agreement, exhaustion of contractural remedies, and the breach of the duty of fair representation by the Union. *Hines v. Anchor Motor Freight,* 424 U.S. 554, 96 S.Ct. 1048 (1976); *Clayton v. International Union* ____ U.S. ____, 101 S.Ct. 2088 (1981). In the Sixth Circuit, the aggrieved employee has the additional jurisdictional requirement of exhausting internal union remedies before maintaining a suit against the union for breach of duty of fair representation. *Willets v. Ford Motor Company,* 583 F.2d 852 (6th Cir. 1978).

The defendants have moved to dismiss the complaint on the grounds that the claim is barred by the statute of limitations.

Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 contains no statute of limitations. In *International Union, UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696, 704-04 (1966), the Supreme Court held that the federal courts should apply the most analogous state statute to §301 suits as a matter of federal law. In *Mitchell v. United Parcel Service,* 451 U.S. 56, 62 (1981), the Supreme Court held that the most appropriate state statute was that pertaining to the vacation of arbitration awards.

The Sixth Circuit has ruled that where an employer's decision has become final through the operation of the collectively bargained-for private system of dispute resolution, the state statute of limitations pertaining to the vacation of arbitration awards will be utilized. *Badon v. General Motors Corp.,* 679 F.2d 93 (6th Cir. 1982). The Sixth Circuit has recently held that a §301 claim for unfair representation or breach of duty of fair representation against the union require application of the same statute of limitations. *Lawson v. Truck Drivers, Chauffeurs and Helpers, Local Union 100,* No. 81-3722 (6th Cir. January 17, 1983).

Accordingly, an action brought pursuant to 29 U.S.C. §185 must be brought within the period defined by state law for appeals from arbitration decisions. *Lawson v. Truck Drivers, Chauffeurs, and Helpers, Local Union 100,* No. 81-3722 (6th Cir. January 17, 1983). The State of Ohio has provided a ninety (90) day limitations statute for vacation of arbitration awards. Ohio Revised Code §2711.13 (1976). The plaintiff was discharged November 18, 1981 and did not institute the instant action until May 18, 1982. The plaintiff's claim is barred by the statute of limitations. *Id.*

The plaintiff argues that the ninety (90) day statute of limitations is not applicable to the instant action and that the six (6) month statute provided by §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) governs.

The plaintiff has misapplied the law. The plaintiff's complaint states that "[T]his action is brought pursuant to 29 U.S.C. §185..." Although §160(b) provides a six (6) month statute of limitations, that statute is applicable to complaints brought before the National Labor Relations Board against persons who are alleged to have engaged in unfair labor practices, 28 U.S.C. §160(b).

The complaint fails to state a claim upon which relief can be granted, and as the Court has considered matters outside the pleadings and finds that there is no genuine issue of material fact, the defendants' motions for summary judgment are GRANTED.

Summary Judgment for Defendants.

IT IS SO ORDERED.

George W. White
U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

C82-1330

Walter Macon,
Plaintiff

v.

ITT Continental Baking
Company, Inc., et al.,
Defendant

ORDER

Pursuant to the Court's Memorandum and Order filed February 17, 1983,

IT IS ORDERED that plaintiff's complaint is hereby dismissed at plaintiff's costs.

George W. White
United States District Judge